BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALBERT J. CHRISTIAN	)	
Claimant	)	
	)	
VS.	)	
	)	
SECURED STAFFING, INC.	)	
Respondent	)	Docket No. 1,061,542
	)	
AND	)	
	)	
TECHNOLOGY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the September 13, 2012, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery. Mitchell D. Wulfekoetter, of Topeka, Kansas, appeared for claimant. Kendra M. Oakes, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of his employment and that claimant's accident was the prevailing factor causing his injury, need for treatment, medical condition and disability. Respondent was ordered to pay claimant temporary total disability compensation commencing June 14, 2012, until further order, until claimant is certified as having reached maximum medical improvement, or until claimant is returned to gainful employment, whichever occurs first. Respondent was also ordered to pay for claimant's medical treatment with Dr. Lawrence Drahota.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 13, 2012, Preliminary Hearing and the exhibits and the

independent medical examination (IME) report and supplemental letter of Dr. Lawrence Drahota,[1] together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant failed to prove he sustained an accidental injury arising out of and in the course of his employment or that such alleged accidental injury was the prevailing factor causing his injury, current need for treatment, medical condition and disability.

Claimant asks the Board to affirm the ALJ's Order for Compensation.

The issues for the Board's review are:

(1) Did claimant sustain accidental injury arising out of and in the course of his employment?

(2) If so, was claimant's accident the prevailing factor causing his injury, current need for treatment, medical condition and disability?

FINDINGS OF FACT

Claimant was employed by respondent, a temporary placement service. He had been placed with Asset LifeCycle (ALC), where he worked as a truck driver. As part of his job, he helped load and unload computers and other electronic devices. On Wednesday, June 13, 2012, he was loading a truck in Baldwin City, Kansas. Claimant said he jacked up the pallet to move the product to the front of the trailer. There was about 700 pounds of weight on the pallet. When claimant pushed the pallet to get it moving, he felt a pop in his groin and felt immediate pain. He immediately reported the injury to Hague Shakezen, one of ALC's supervisors, and finished working that day.

Claimant returned to work on Thursday and Friday, although he was in some pain. Claimant continued to have problems over the weekend. He went to work on Monday and worked about an hour and a quarter, and then he reported the injury to Brenda Lyden, respondent's manager, and to Brian Applebaugh, a supervisor at ALC, so he could see a doctor. Claimant testified Ms. Lyden told him to go to Med-Assist to get checked out. It was claimant's understanding this treatment would be covered under workers compensation.

[1] Dr. Drahota's IME report dated August 22, 2012, was filed with the Division on August 27, 2012, and his supplemental letter dated August 24, 2012, filed with the Division on August 30, 2012.

The Med-Assist records show that claimant was seen on June 18, 2012, with a chief complaint of "swollen lymph nodes in groin vs. hernia."[2] After being examined, claimant was diagnosed with acute bilateral hernias. He was given restrictions of no lifting above 20 pounds, no ladders and no climbing. Claimant was restricted to sedentary work and was instructed to follow up with a general surgeon. Claimant took his list of restrictions to Ms. Lyden, who told him she would find something for him to do within the restrictions and that he was to go home and wait for her call. After about four days, claimant called respondent and spoke to the receptionist. He asked about available work and about medical treatment. He was told there was no work available and that respondent was waiting for its insurance carrier to process his claim. As of the date of the preliminary hearing, claimant has not heard from respondent about available work within his restrictions, nor had he received any further medical treatment.

Respondent entered as evidence an affidavit from Brian Applebaugh wherein Mr. Applebaugh indicated that on Monday, June 18, 2012, claimant reported he was going to the doctor because he had discovered two lumps in his groin a day earlier, on Sunday, June 17, 2012. Mr. Applebaugh confirmed that claimant was not working at ALC on Sunday, June 17.

After claimant reported his injury to respondent, he was asked to write a statement about his accident. On June 19, 2012, claimant wrote that he had noticed swelling in his lymph nodes two weeks earlier after returning from a trip to Oklahoma City. He stated that on June 13, 2012, after he had returned from Baldwin City, the swelling became so large he called respondent so he could see a doctor. Claimant said when he had the swelling in early June, he did not have any pain and did not see a doctor. The swelling had gone away, and by June 13, 2012, he was not having any swelling or problems with his groin area until after pushing the pallet. Claimant had not had any problems with swelling of the lymph nodes in his groin before early June 2012 and had never sought treatment for any problems with his groin before his current work-related injury.

Claimant could give no reason for mentioning his previous swollen lymph nodes in his June 19, 2012, statement, other than he was "leading up to" telling about his June 13, 2012, accident.[3] His swelling on June 13, 2012, was not the same as the swelling in his lymph nodes and was in a different area. Claimant also stated he had done nothing after the incident in Baldwin City that would have caused his problem to worsen.

Brenda Lyden testified claimant reported his alleged injury to her on Monday, June 18, 2012. She also testified that claimant previously told her his wife had surgery and

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[2] P.H. Trans., Cl. Ex. 1 at 1. Claimant said he was not a doctor and did not know how to explain the problem in his groin area when talking to the medical personnel at Med-Assist.

[3] P.H. Trans. at 19.

that he had to lift her and help her move around. Ms. Lyden said claimant told her that after his injury, his wife fell and he had to have a neighbor help him lift his wife. Claimant acknowledged that his wife is disabled and recently had hip surgery. He denied his wife needed help getting around.

Claimant was evaluated by Dr. Lawrence Drahota, a surgeon, on August 22, 2012, at the order of the ALJ. Dr. Drahota indicated claimant gave him a history of a sudden pain in his groin while he was attempting to move a pallet of computers on June 13, 2012. Claimant told him the swelling appeared the next day. Dr. Drahota diagnosed claimant with bilateral inguinal hernias, which he said would be consistent with the history given to him by claimant.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

> (d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.
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> . . . .
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> (f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . . .

> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> (g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-516(a) states:

> In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[5]

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[4] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[5] K.S.A. 2011 Supp. 44-555c(k).

ANALYSIS

Although not specifically listed as an issue by either party, this order must first address a question raised by respondent concerning the record. The ALJ's Order for Compensation does not contain an itemization of the record, but it does mention Dr. Drahota by name. Respondent's Brief to the Board contains a section entitled "Evidence Submitted" and lists, inter alia, Dr. Drahota's court-ordered report dated August 22, 2012, and amended report dated August 24, 2012.[6] Whether these reports are part of the record is not listed as an issue in respondent's brief. Nevertheless, under the section entitled "Arguments & Authorities," respondent states, "Dr. Drahota's reports were not introduced into evidence at the preliminary hearing."[7] Respondent then argues that because claimant presented no medical opinion on causation, his claim must be denied, citing the Board's discussion in *Lowrey*.[8] This argument fails for two reasons. First, Dr. Drahota's reports are part of the record considered by the ALJ. Second, respondent misinterprets *Lowrey* as standing for the proposition that an expert medical opinion is always required to prove the accident was the prevailing factor in causing the medical condition.

An ALJ is permitted to have a claimant examined by a neutral health care provider.[9] Prior to the preliminary hearing, Judge Avery selected Dr. Drahota to perform such an examination.[10] An ALJ is not required to obtain an independent medical evaluation from a neutral examiner, but once he does so, the ALJ is required to consider the report from the neutral examiner. Judge Avery properly considered Dr. Drahota's reports in making his September 13, 2012, preliminary hearing Order for Compensation. In reviewing the ALJ's order, this Board Member must consider the same evidence considered by the ALJ.[11] Therefore, this Board Member will consider Dr. Drahota's August 22, 2012, and August 24, 2012, reports.

The Board Member who decided *Lowrey* did not say, as respondent alleges, that a claimant's testimony alone cannot prove an accident was the prevailing factor in causing the injury. To the contrary, the uncontradicted testimony of a claimant may be sufficient to satisfy claimant's burden of proof. However, in *Lowrey*, claimant's testimony was not uncontradicted. There was medical evidence indicating claimant's injury was an

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[6] Respondent's Brief at 1 (filed Oct. 8, 2012).

[7] *Id.* at 3.

[8] *Lowrey v. U.S.D. 259*, Docket No. 1,056,645, 2011 WL 6122929 (Kan. WCAB Nov. 21, 2011).

[9] K.S.A. 2011 Supp. 44-516(a).

[10] ALJ's Order Referring Claimant for Independent Medical Evaluation (Aug. 14, 2012) at 1.

[11] K.S.A. 2011 Supp. 44-555c(a).

aggravation of a preexisting condition. With that additional evidence not being explained in the context of whether the accident was the prevailing factor for the requested treatment, it was determined that claimant had not met his burden of proof. That said, to the extent there is evidence in this case suggesting claimant had a preexisting condition, the *Lowrey* decision is applicable.

In this case, claimant attributes his hernias to the pushing of the heavily loaded pallet jack on June 13, 2012. Dr. Drahota agrees that this is a competent cause of claimant's condition, although he describes the activity as "lifting" in his August 24, 2012, report. In his August 22, 2012, report, Dr. Drahota more completely recites the history as "an injury that occurred while he [claimant] was lifting a pallet of computers at Baker College on June 13, 2012. He states that they were trying to get this pallet into the truck and he attempted twice to move it into a better position and felt a sudden pain in his groins."[12] This lifting versus pushing distinction does not disqualify Dr. Drahota's causation opinion. Likewise, the fact that claimant noticed some swelling in his groin area before June 13, 2012, does not discredit claimant's testimony relating his current injury and condition to the work accident because claimant said the earlier swelling was in a different area and that swelling went away before this incident. Granted the history recited in Dr. Drahota's report suggests the history he was given did not contain all the details contained in claimant's preliminary hearing testimony, but it is sufficient to give his opinion credibility and weight.

The ALJ apparently found claimant's testimony to be credible because he awarded claimant preliminary benefits. The Board generally gives an ALJ's determination of credibility some deference where the ALJ observed the in-person testimony of the witness. Based on the record presented to date, this Board Member finds claimant's testimony, together with the independent medical evaluation reports by Dr. Drahota, satisfies claimant's burden to prove his bilateral hernia injuries arose out of and in the course of his employment with respondent and that the accident at work on June 13, 2012, was the prevailing factor causing his injury, medical condition and current need for treatment.

CONCLUSION

(1) Claimant sustained accidental injury arising out of and in the course of his employment.

(2) Claimant's accident was the prevailing factor causing his injury, current need for treatment, medical condition and disability.

[12] Dr. Drahota's IME report dated August 22, 2012, filed with the Division on August 27, 2012.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Compensation of Administrative Law Judge Brad E. Avery dated September 13, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge